STATE OF MICHIGAN

COURT OF APPEALS

ERIC S. BLUM,

Plaintiff-Appellant,

v

SHEILA KAMIN WEINBERG,
f/k/a SHELIA KAMIN,

Defendant-Appellee.

UNPUBLISHED
April 15, 2003

No. 233714
Oakland Circuit Court
LC No. 99-017675-CK

ERIC S. BLUM,

Plaintiff-Appellee,

v

SHEILA KAMIN WEINBERG,
f/k/a SHEILA KAMIN,

Defendant-Appellant.

No. 233811
Oakland Circuit Court
LC No. 99-017675-CK

Before: White, P.J. and Kelly and Gribbs*, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff and defendant appeal as of right the trial court's order granting plaintiff a judgment of $45,340.50 against defendant after a bench trial in this breach of contract case. In Docket No. 233714, plaintiff argues that the trial court erred in finding that defendant did not waive her right to share in the proceeds of the sale of a ring, in its calculation of the damage award, and in considering defendant's untimely motion for reconsideration. In Docket No. 233811, defendant argues that the trial court erred in finding that a valid contract existed between the parties and in calculating the damage award. We affirm in part, reverse in part, and remand for further proceedings.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

I. Basic Facts and Procedural History

Plaintiff and defendant are brother and sister. After their mother died in Florida in 1994, plaintiff and defendant commenced litigation contesting the validity of her will and trust. Shortly before her death from cancer, their mother changed her trust to leave the great majority of her $1.2 million estate to her youngest daughter, plaintiff's and defendant's sister. Plaintiff and defendant believed that the sister unduly influenced the mother into changing her estate plan to exclude plaintiff and severely curtail defendant's share of the estate. Alternately, plaintiff and defendant claimed that their mother was not competent when she made the last two of the four amendments to her trust. Plaintiff and defendant signed a contingency retainer agreement with their Florida attorneys agreeing that they would each pay fifty percent of the litigation costs, and each paid $5,000 toward the $10,000 nonrefundable retainer.

In 1996, plaintiff withdrew from the Florida litigation. Plaintiff drew up the agreement in dispute whereby, depending on the outcome, he and defendant would share the proceeds of the Florida suit. This agreement states, in pertinent part:

> This agreement between Sheila Kamin and Eric Blum is the exclusive agreement between the parties in the matter of the estate of Evelyn Blum. In the event of litigation or settlement this agreement is the sole understanding between the parties as to distribution of the estate of Evelyn Blum.
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> * * *
>
> B. DISTRIBUTION UPON SETTLEMENT OR LITIGATION
>
> In the event that Sheila Kamin and/or Eric Blum litigate or in any other way settle their estate dispute with Peri Blum, other than the April 12, 1993 Revocable Trust agreement, then the distribution of the assets between the two will be as follows:
>
> 1. $50,000 from Sheila Kamin's portion of the trust minus taxes on a pro rata basis.
>
> 2. One half of Sheila Kamin's portion of the will, including all monies and sale of the items listed in the will, minus taxes on a share equally basis.

In 1999, defendant reached a settlement with her mother's estate whereby she received a lump-sum payment of $200,000. She also received a platinum diamond ring valued at $25,000 to $35,000. Defendant stated that she had asked for the ring so that plaintiff would have something "equitable". After the Florida attorneys received their contingency fee and costs, defendant received a net cash settlement amount of $140,581.02. Defendant directed the attorneys to send the diamond ring to plaintiff's son. Defendant refused to give plaintiff any portion of the cash settlement telling him "I'm giving you the ring, that's all you're getting. If you want any more sue me."

Thereafter, plaintiff commenced the instant action. In his complaint, plaintiff alleged that defendant breached their agreement regarding the sharing of the proceeds of the Florida

litigation. Defendant responded with the defense that the agreement lacked consideration and was, therefore, not valid.

A bench trial was held on October 31, 2000 before a Wayne County Circuit Court judge assigned as a visiting judge in Oakland County Circuit Court. The court heard testimony and the parties' arguments and then requested that the parties submit proposed findings of fact and conclusions of law. The trial court signed an opinion and order granting judgment for plaintiff in the amount of $45,340.50 on January 19, 2001. This order was filed in Oakland Circuit Court on January 24, 2001. In the opinion, the court found that plaintiff had given defendant ample consideration to enter into the agreement. Therefore, a valid agreement existed between plaintiff and defendant whereby they would share equally the expenses of the Florida litigation and plaintiff would receive "one-half of all monies recovered." The court calculated plaintiff's damages from defendant's breach of the agreement as $70,340.50. The court off-set this amount by the $25,000 plaintiff had received from the sale of the platinum diamond ring, thus granting plaintiff a net award of $45,340.50.

On February 2, 2001, plaintiff filed a motion for reconsideration, claiming that the court erred in deducting the full amount plaintiff received from the sale of the ring instead of one-half that amount. This motion was denied, the court finding it had not made a palpable error in giving defendant full credit for the sale price of the ring.

On February 7, 2001, defendant filed a motion for reconsideration, arguing that the court erred in finding a valid agreement and that defendant was entitled to a further setoff of one-half of the litigation expenses plaintiff did not pay against the damage award. This motion was granted in part by an order dated March 22, 2001, and filed in Oakland Circuit Court on April 3, 2001. The court found that it did not make a palpable error in finding a valid agreement between plaintiff and defendant or in its interpretation of the agreement, but agreed with defendant that she should be granted a further credit of $3,409.50 for shared expenses.

Both parties appeal.

II. Docket No. 233714

A. Waiver

Plaintiff's first argues that the trial court erred in finding that defendant did not waive her interest in the sale proceeds of the ring. This Court reviews a trial court's findings of fact for clear error giving special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility. MCR 2.613(C); *H J Tucker & Assoc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999).

Plaintiff claims that defendant waived her right to the sale proceeds of the ring by stating during her divorce trial that she did not expect anything from the sale of the ring. The trial court specifically found that this was not a waiver. This Court, in *Tucker*, *supra*, 234 Mich App 564, has defined "waiver" as follows:

> To constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or

> advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment. . . .
>
> * * *
>
> A waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance. [Quoting *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718-719; 179 NW2d 252 (1970) (citation omitted).]

Plaintiff contends that, since defendant made the statement with full knowledge of plaintiff's claims in the present case, her conduct was an express indication of her intent to relinquish a known right. We disagree.

As pointed out by defendant, the issue actually litigated in the divorce proceeding was whether the ring was property of the marital estate and therefore potentially subject to division between her and her now ex-husband. In the divorce action, defendant's former husband took the position that the settlement and ring were part of the marital estate; a position defendant contested. Although her statement could constitute a waiver of her interest in the ring if it had been found to be a part of the marital estate, we do not find this to be a waiver of her right to set-off in this breach of contract action involving a third party. Her legal interest in the ring in the divorce action was entirely different than in the instant matter. Furthermore, defendant's statement in her divorce trial is actually consistent with her testimony in the instant case: defendant intended the ring to be plaintiff's share of the settlement of the Florida litigation and that defendant would keep the cash settlement.

Given the differing circumstances of two lawsuits and defendant's differing legal interest in the proceeds of the ring, the trial court did not clearly err in finding that defendant had not waived her right to her interest in the ring.

B. Motion For Reconsideration

Plaintiff also contends that the trial court erred in considering defendant's untimely motion for reconsideration and in granting her relief to which she was not entitled. We disagree. This Court reviews a trial court's grant of reconsideration for an abuse of discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450 NW2d 6 (1990).

Plaintiff correctly cites MCR 2.602(A)(2) and MCR 2.119(F)(1) for the proposition that a judgment is entered on the day it is signed, not when it is filed, and that a motion for reconsideration must be filed within fourteen days of the date of entry of the order. However, defendant argued, and the trial court agreed, that the circumstances of the judge sitting on the bench in Wayne Circuit Court while hearing and deciding this Oakland Circuit Court case, whose orders would necessarily be filed in Oakland Circuit Court, mitigated the delay in defendant's filing of her motion for reconsideration. In addition, defendant's motion was filed within fourteen days of the actual filing date in Oakland Circuit Court.

"The [fourteen-day] time requirement under [MCR 2.119(F)(3)] does not limit the discretion of the circuit court to consider a motion for reconsideration nor does a party's failure to file a timely motion bar this Court from reaching the merits of the controversy." *Bers v Bers*, 161 Mich App 457, 462-463; 411 NW2d 732 (1987). MCR 2.108(E) provides that a trial court may extend the time for filing a motion where another rule does not otherwise limit a court's authority to do so. See *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 549-550; 493 NW2d 492 (1992). Therefore, the trial court did not clearly err when it considered defendant's motion for reconsideration.

Finally, plaintiff challenges the damage award rendered by the trial court. Because defendant also challenges the damage award, we will address plaintiff's argument in correlation with defendant's arguments.

III. Docket No. 233811

A. The Agreement

Defendant claims that the trial court erred in finding that there was a valid agreement between plaintiff and defendant because the agreement was lacking in consideration. We disagree.

In Michigan, the essential elements of a valid contract are: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. It is a fundamental principle of contract law that a promise to pay is not a binding or enforceable promise if it is not supported by consideration. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The Michigan Supreme Court has defined consideration as "a benefit on one side, or a detriment suffered, or service done on the other." *Sands Appliance Services v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000), citing *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949). In addition,

> "Consideration" is a legal term and has acquired a unique meaning under the law. It is the inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. [*Sands*, *supra*, 463 Mich 241-242, citing Black's Law Dictionary (6th ed), p 306.]

Whether there was consideration for a promise is a question for the trier of fact. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992). Defendant argues that a valid agreement does not exist between her and plaintiff because plaintiff did not provide any consideration for her promise to share the proceeds of the Florida litigation with him. Defendant claims that the written provision in the agreement requiring plaintiff to pay one-half of all expenses incurred in the Florida litigation is not consideration because plaintiff was required to pay these expenses under the retainer agreement he signed earlier with the Florida attorneys.

The performance of a preexisting duty or legal obligation is generally held not to be sufficient consideration for a return promise. The preexisting duty rule "is the general rule that a promise to do that which the promisor legally is bound to do does not constitute consideration, or sufficient consideration, for a new contract." *In re Easterbrook Estate*, 114 Mich App 739, 748; 319 NW2d 655 (1982); citing *Green v Millman Bros, Inc*, 7 Mich App 450, 455; 151 NW2d 860 (1967). However, plaintiff's withdrawal from the litigation, as indicated by his letter to the Florida attorneys renouncing all interest in the pending litigation, severed his obligation under the retainer agreement to share equally in the costs of the litigation. Therefore, plaintiff's continued payment of one-half of defendant's litigation costs was consideration for the agreement.

In addition, plaintiff had given consideration by withdrawing from the litigation and giving up his right to one-half the litigation proceeds under the retainer agreement and his $5,000 nonrefundable retainer fee. Also, plaintiff's withdrawal from the Florida litigation was forbearance, and defendant received a benefit, or "service done," from it because her case became stronger. Therefore, we find that the trial court did not clearly err in finding that a valid agreement existed between plaintiff and defendant.

B. Amount of Damages

Plaintiff and defendant both contest the determination of the damages awarded to plaintiff. Plaintiff contends that the trial court erred in granting defendant setoffs of $25,000 for the ring and $3,409.49 for unpaid expenses. Defendant contends that the trial court erred in its interpretation of the agreement to give plaintiff an equal share in the net settlement proceeds. Where a court following a bench trial has determined the issue of damages, we review the award for clear error. *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000). Clear error exists where, after a review of the record, this Court is left with a firm and definite conviction that a mistake has been made. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 91; 592 NW2d 112 (1999). The trial court's decision to grant a setoff, a matter in equity, is reviewed de novo. *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997).

The construction and interpretation of an unambiguous contract is a question of law that this Court reviews de novo. Whether terms of a contract are ambiguous is also a question of law that this Court will review de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). In determining whether a contract provision is ambiguous, this Court is to give the language used its ordinary and plain meaning to see if "its words may reasonably be understood in different ways." *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 597 NW2d 411 (1998), citing *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). In *UAW-GM Human Resource Center*, *supra*, 228 Mich App 491, this Court stated:

> We must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning. [Quoting *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947) (citations omitted).]

Here, the critical portion of the agreement stated:

> In the event that Sheila Kamin and/or Eric Blum litigate or in any other way settle their estate dispute with Peri Blum, other than the April 12, 1993 Revocable Trust agreement, then the distribution of the assets between the two will be as follows:
>
> 1. $50,000 from Sheila Kamin's portion of the trust minus taxes on a pro rata basis.
>
> 2. One half of Sheila Kamin's portion of the will, including all monies and sale of the items listed in the will, minus taxes on a share equally basis.

The trial court adopted plaintiff's findings of facts and interpreted the above paragraph to mean that plaintiff was to receive: (1) $50,000 from Sheila Kamin Weinberg's portion of the trust, (2) one-half of Sheila Kamin Weinberg's portion of the will, (3) one-half of all monies recovered, and (4) one-half of the sale of items listed in the will.

We believe that the trial court's interpretation of the agreement is erroneous. The agreement plainly states that, if the estate dispute is settled, plaintiff is to receive $50,000, less taxes, from defendant's part of the trust and "one half of [defendant's] portion of *the will*, *including* all monies and sale of the items *listed in the will*." Nowhere does the agreement state "monies recovered." Here, plaintiff presented no evidence regarding what passed to defendant through the will. In fact, he testified that he did not know what was in the estate outside of the trust. Defendant testified that only personal property of little value, which she shared equally with plaintiff, passed to her through the will. The settlement did not pass to defendant through the will. Therefore, plaintiff was entitled to receive $50,000 under the agreement, but that was the extent of plaintiff's claim.

This conclusion is further supported by (1) plaintiff's testimony that, if there was nothing left to pass under the will, he would receive the same under paragraph A or B of the agreement, i.e., $50,000, and (2) plaintiff's request for and receipt of a preliminary injunction preventing defendant from spending $50,000 of the settlement proceeds. Under the plain language of the agreement, which was drafted by plaintiff, plaintiff is entitled to $50,000 and one-half of whatever defendant received under the will. It is a general precept of contract law that a contract is construed against the party responsible for drafting a disputed provision. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 183-184; 565 NW2d 887 (1997).

C. Amount of Set-Off

Under the plain language of the agreement drafted by plaintiff, plaintiff is entitled to $50,000 and one-half of whatever defendant received under the will. Accordingly, to calculate damages, the source of the ring must first be determined. The decedent's will provides:

Article II

> I devise certain items of my personal property in accordance with a written statement which I have prepared prior to my death in conformity with Florida law. My Personal Representative may assume that no such written statement exists if none is found within thirty (30) days after admission of the Will to probate.

Article III

> I give and bequeath all my jewelry . . . which have not been otherwise disposed of by the aforesaid written statement in equal shares to those of my children, SHELIA KAMIN and PERI BORRESEN who survive me. My personal representative shall sell any property as to which there is no agreement . . . and shall add the proceeds to the residue of the trust.

On this record the source of the ring is unclear. If the ring was given to Peri Borresen prior to her mother's death or pursuant to the "written statement" referred to in Article II, it is not part of the property that passes through the trust or to defendant under the will. In that case, defendant would be entitled to the full set-off of $25,000. If the ring was part of defendant's share of the "jewelry" in Article III of the will, then plaintiff is entitled to one-half the value of the ring and defendant would be entitled to a set-off of $12,500 pursuant to section B. 2. of the agreement. If the ring was a disputed item under Article III which then would have reverted to the trust, defendant would be entitled to the full set-off of $25,000. Because the record is unclear, we remand for further proceedings to determine the source of the ring and the amount of the set-off.

D. Unpaid Legal Expenses

Finally, plaintiff argues the trial court erred in giving defendant a credit of $3,409.49 for unpaid expenses incurred in the Florida litigation. We disagree.

With respect to litigation expenses, the agreement states that "[a] ll court costs, depositions, witness fees including experts, and transcript costs, will be paid equally between Shelia Kamin and Eric Blum." At the time of the settlement, the outstanding expenses totaled $6,818.98. This amount was deducted from the gross settlement. Plaintiff did not pay anything toward these costs and defendant paid them in their entirety from the settlement. By the express terms of the agreement between the parties, plaintiff was required to pay one-half of the unpaid costs. Thus, the trial court did not err in giving defendant credit in the amount of $3,409.45.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kirsten Frank Kelly